

The claimant has filed an Application for Review requesting the Appeals Board to review the Award entered by Administrative Law Judge Robert H. Foerschler, dated January 13, 1994.

The sole issue presented at oral argument for review is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Administrative Law Judge Robert H. Foerschler awarded the claimant a ten percent (10%) permanent partial general disability based on functional impairment as a result of an injury the claimant sustained while employed by the respondent. The claimant contends that the ten percent (10%) functional impairment award is inappropriate because the claimant has established through her own testimony that she has sustained a substantial work disability in excess of the functional impairment rating. Respondent approves of the Administrative Law Judge's award, arguing that the claimant has failed to establish by a preponderance of the credible evidence that she has sustained a work disability.

On October 26, 1990, the claimant, Linda Miller, had been employed by the respondent, Max Rieke and Brothers, Inc., as a dump-truck driver for three and one-half years. While employed by the respondent, she also was a member of Teamster Local 541, Heavy Haulers. The claimant injured herself on this date as she was reaching down to the floorboard to activate the hydraulic system with her right hand. She had to lean to the right and jerk hard to activate this system because it had a kink in it. She immediately felt pain in her neck which radiated down her right shoulder to her finger tips. This pain was then accompanied by a sudden headache. She was able to finish the remainder of her workday and that evening sought medical treatment with Dr. Balderston, a chiropractor.

Dr. Balderston examined the claimant but did not provide treatment as he was of the opinion that she had suffered a herniated disc in her neck. He did place her in a cervical collar for protection until she could be seen by the respondent's doctor.

Boyd Vereen, D.O., of Occupational Medicine Associates, Kansas City, Kansas, first saw claimant on November 2, 1990. He diagnosed an acute cervical strain. He prescribed anti-inflammatory and muscle relaxant medications. She was also taken off work and placed in a daily physical therapy program. Because of limited improvement, Dr. Vereen discontinued the physical therapy and ordered an MRI on December 7, 1990, to rule out any disc pathology.

The MRI revealed degenerative disc and facet changes at C5-C6 and C6-C7. Also, it showed a possible right posterior lateral disc protrusion at C5-C6. As a result of the MRI findings, claimant's persistent complaints including numbness of her right hand, Dr. Vereen referred the claimant on December 10, 1990, for evaluation and treatment to Steven L. Reintjes, M.D.

Dr. Reintjes is a neurological surgeon located in North Kansas City, Missouri. He first saw the claimant on December 17, 1990. After examining the claimant and reviewing

the MRI report, it was his impression that the claimant was suffering from a right C6 radiculopathy secondary to a right C5-C6 herniated disc. He recommended that the claimant undergo cervical myelogram followed by CT scan. Dr. Reintjes' impression was that if a herniated disc was confirmed, he would consider the patient a surgical candidate for an anterior cervical discectomy and possible fusion.

The evidentiary record in this case is somewhat confusing as to the medical treatment the claimant received from Dr. Reintjes after her initial examination of December 17, 1990. The medical records from Baptist Medical Center in Kansas City, Missouri, indicated that Dr. Reintjes admitted claimant on December 26, 1990, with a diagnosis of headaches and right upper extremity pain. Claimant was admitted for cervical myelogram with follow-up CT scan of the cervical spine. An EMG and nerve conduction study was also performed during this hospitalization.

Claimant was discharged on December 27, 1990, as the EMG and nerve conduction study were normal and the cervical myelogram showed only mild asymmetric root sleeve filling at C4-5 and at C5-6. Even though the hospital records indicate that the claimant was admitted only for diagnostic purposes, the claimant testifies that the purpose for the hospitalization was for Dr. Reintjes to perform an anterior discectomy and fusion on her cervical spine. Dr. Reintjes did not testify in this case and the medical records only confirm that the claimant was hospitalized for diagnostic proposes and not for surgery. After the claimant was discharged from the hospital on December 27, 1990, by Dr. Reintjes, she did not return to him for any further medical treatment.

Respondent's insurance carrier then referred the claimant for examination and evaluation by Robert Tenny, M.D., a board-certified neurological surgeon, in Shawnee, Kansas, on February 19, 1991. At the time of that examination, Dr. Tenny had the benefit of medical records from Dr. Balderston, Dr. Vereen, Dr. Reintjes, and the diagnostic tests ordered by these doctors.

Dr. Tenny took a history from the claimant and conducted a physical examination. He found no evidence of spinal cord or nerve root compression. He ordered an EMG of her right upper extremity which was normal. Dr. Tenny concluded that the claimant had a hysterical sensory examination, meaning that the decreased sensation pattern that the claimant described was not anatomically possible. Dr. Tenny saw the claimant for the second time on May 7, 1991, when he released her to return to dump truck driving without any restrictions. It was his opinion that the claimant had suffered no permanent partial impairment as a result of her right upper extremity injury.

At the request of the claimant's attorney, Nathan Shechter, M.D., a board-certified orthopedic surgeon, examined and evaluated the claimant on September 10, 1991. The claimant presented complaints of constant pain in her cervical spine area; this pain was aggravated by turning her head from side to side; pain radiated down her right arm; and numbness extended down her right arm to her fingers of her right hand.

As a result of this examination, Dr. Shechter's impression was that the claimant had sustained a muscular ligamentous injury to her cervical spine directly related to her accident of October 26, 1990, with the possibility of a herniated intervertebral cervical disc. His functional impairment opinion was fifteen percent (15%) of the whole body. He restricted the claimant from doing any excessive mobility of the cervical spine such as dump truck driving which requires head movements from side to side.

The last physician to examine the claimant was board-certified orthopedic surgeon, Dr. John Romito of Overland Park, Kansas. This was again a referral by the respondent's insurance carrier for an examination and rating appointment which occurred on April 10, 1992. A medical history was taken from the claimant and a physical examination was conducted by Dr. Romito. He also had the benefit of medical records from the previous treating and evaluating doctors plus the previous diagnostic testing results. Dr. Romito interpreted the MRI scan which was taken on December 7, 1990, as showing a herniated disc on the right at the C5-6 level. This was consistent with his finding of decreased sensation that the claimant had to the pinwheel test conducted down her right arm. It was Dr. Romito's opinion that the claimant's upper extremity problems were due to the potential of a herniated disc.

In regard to permanent partial disability, Dr. Romito's opinion was that the claimant had sustained an eighteen to twenty percent (18-20%) functional impairment of the whole body as a result of her work-related injury. If the claimant had been referred to Dr. Romito for treatment, he would have referred her to one of his orthopedic colleagues who perform neck surgery because of the abnormal findings resulting from the MRI scan and the physical examination. It was Dr. Romito's conclusion that the claimant could not return to driving a dump truck because of her right upper extremity weakness and cervical pain. As to other permanent work restrictions, Dr. Romito indicated that basically she could do anything that she was able to tolerate without endangering herself and others.

In early 1991, the claimant voluntarily moved from the Kansas City Metropolitan area to La Harpe, Kansas, a small town located outside of Iola, Kansas. At the time of the regular hearing held on August 14, 1992, the claimant had been working full-time since May 1991 as a cashier at Country Mart, a deli and grocery store, located in Iola, earning \$4.50 per hour. Prior to obtaining her present job, she had applied for work as a florist and other cashier jobs. She had not applied for a dump truck driving job because she believed her injuries prevented her from doing that type of work. The claimant described having continued neck pain and right arm pain. She had restricted head movement because of the pain. Lifting movements increase the pain level. She is unable to do housework, grocery shopping, run a vacuum cleaner and lift the laundry.

Both Dr. Romito, who examined and evaluated the claimant for the respondent, and Dr. Shechter, who examined and evaluated the claimant at her attorney's request, agreed that the claimant, because of her limited cervical spine mobility, could not return to her job as a dump truck driver. Both of these physicians restricted the claimant from performing jobs requiring excessive movement of her head. Also, these physicians both were of the opinion that the claimant, as a result of her work-related injury, had sustained permanent functional impairment of the whole body. The only physician who did not permanently restrict the claimant, or who did not give an opinion as to permanent impairment, was Dr. Tenny. After reviewing the testimony of these physicians in conjunction with the claimant's testimony in regard to her physical condition, the Appeals Board finds that Dr. Tenny's opinions differ so substantially from this evidence that his opinions should be given little or no weight in deciding this case.

The Workers Compensation Act places the burden squarely upon the claimant to establish her right to an award of compensation and to prove the various conditions on which her right to recovery depends. K.S.A. 44-501(a). The claimant has the burden to present by a preponderance of the credible evidence that her position on an issue is more probably true than not true on the basis of the whole record. K.S.A. 44-508(g). The primary issue that is now presented to the Appeals Board is whether the claimant has

established by a preponderance of evidence that it is more probably true than not true that as a result of her accidental injury she has sustained a work disability.

The claimant takes the position that she has established through her uncontradicted testimony that as a result of her work-connected injury, her ability to perform work in the open labor market and to earn comparable wages has been reduced. K.S.A. 1989 Supp. 44-510e(a). Claimant alleges that since she cannot return to her job as a dump truck driver, that she made application for other jobs and that she obtained a job in Iola, Kansas, paying one-hundred eighty dollars (\$180.00) per week, is credible evidence for the fact finder to determine work disability. In establishing work disability, the Kansas Supreme Court in the case of Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), did not mandate that a specific formula be used to arrive at the extent of permanent partial general disability, but did require consideration of both the employee's loss of ability to perform work in the open labor market and loss of ability to earn comparable wages. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). Unfortunately, no vocational expert opinion or other competent testimony was provided to establish the percentage to which the ability of the claimant to perform work in the open labor market and to earn comparable wages had been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation. K.S.A. 1989 Supp. 44-510e(a). The only evidence that the claimant presented in reference to establishing these two essential factors is that she is presently earning, in a small town, \$4.50 per hour working forty (40) hours per week. It is the conclusion of the Appeals Board that this fact is insufficient evidence to sustain the claimant's burden of proof as to the amount of work disability she has sustained as a result of her work-related injury. The Appeals Board, as the trier of fact, has the ultimate decision concerning the nature and extent of disability of the claimant. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). However, in order for a trier of fact to make a reasonable and appropriate decision in reference to work disability, credible evidence has to be presented in the whole record as to the extent expressed in a percentage that the claimant's accidental injury reduced her ability to perform work in the open labor market and to earn comparable wages. Accordingly, claimant's permanent partial general disability is limited to the percentage of functional impairment. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 196, 558 P.2d 146 (1976).

After reviewing the testimony of both Dr. Romito and Dr. Shechter and in conjunction with the claimant's testimony in regard to permanent functional impairment, the Appeals Board finds that Dr. Romito's opinion in this particular case is more representative of the claimant's permanent functional impairment. As such, the Appeals Board finds and concludes that the claimant is entitled to permanent partial general disability benefits based upon the twenty percent (20%) impairment of function rating to the body as a whole as expressed by Dr. Romito.

Since nature and extent of claimant's disability was the only issue presented to the Appeals Board for review in this matter, the Appeals Board adopts and incorporates herein the findings of Administrative Law Judge Robert H. Foerschler as set forth in his Award, dated January 13, 1994, to the extent that they are not inconsistent with the findings and conclusions expressed in this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler, dated January 13, 1994, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of claimant, Linda Miller, and against the respondent, Max Rieke Brothers, Inc., and its insurance carrier, St. Paul Fire and Marine Insurance Co., for an accidental injury sustained on October 26, 1990, and based upon an average weekly wage of \$809.19.

Claimant is entitled to 22.43 weeks of temporary total disability benefits at the rate of \$278.00 per week or \$6,235.54, followed by payment of \$107.90 per week for 392.57 weeks or \$42,358.30, for a 20% permanent partial general disability, making a total award of \$48,593.84.

As of August 26, 1994, there is due and owing the claimant 22.43 weeks of temporary total disability compensation at \$278.00 per week or \$6,235.54, plus permanent partial general disability compensation at \$107.90 per week for 177.71 weeks in the sum of \$19,174.91 for a total due and owing of \$25,410.45, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$23,183.39 shall be paid at \$107.90 for 214.86 weeks until fully paid or until further order of the Director of Kansas Workers Compensation.

IT IS SO ORDERED.

Dated this ____ day of August, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Davy C. Walker, 755 New Brotherhood Building, Kansas City, KS 66101
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Robert H. Foerschler, Administrative Law Judge
George Gomez, Director